Muhamad Zafir bin Kamil v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-05(M)-199–04 OF 2018 AND A-05(M)-200–04 OF 2018
MOHTARUDIN BAKI, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
27 MARCH 2019

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants charged with offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 — Appellants convicted and sentenced to death — Whether reasonable doubt raised on identity of exhibits — Whether convictions entered by learned judicial commissioner unsafe — Whether appellants should be discharged and acquitted — Dangerous Drugs Act 1952 s 39B(1)(a)

The appellants in these two appeals were jointly charged and convicted by the High Court for the offence of trafficking in 5,029g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and sentenced to death for it. PW2, an agent provocateur who, based on information received from his informer, contacted the appellant in Appeal No A-05(M)-200–04 of 2018, Muhamad Zafir bin Ramli ('Ipin') for the purchase of the drug. They both met at an arranged meeting place where the deal was set and on the appointed date, time and place, as in the charge, a second meeting for the delivery of five kilograms of the drug was held. After Ipin was shown the money by PW2, he asked PW2 to follow him to a lane behind a tomyam shop. At that location the appellant in Appeal No A-05(M)-199–04 of 2018, Mohamad Aliff bin Mohamed Alias ('Aliff') was also present. Ipin then directed Aliff to hand over a bag to him, which he then opened to show its content, which were the slabs of cannabis, to PW2. The pre-arranged signal by PW2 prompted the police raiding team present in the vicinity to swoop in on the two culprits.

Held, allowing the appeal; setting aside the convictions and sentences by the High Court; and discharging and acquitting the appellants:

(1) There was a reasonable doubt raised that the five slabs of cannabis produced in court as exhibits were not the very same slabs seized at the time of the raid. The photographs of the slabs of cannabis seized showed in total ten slabs of cannabis — not five. Secondly, the evidence of PW5 was that he made a small nick at the corner of aluminium cover of each slab but the chemist, PW3 very clearly said in the cross-examination by learned counsel for Ipin that the five slabs he received were nicely wrapped. It was very damning to the prosecution because it contradicted

that of PW5. Therefore, there was a genuine reason to doubt the identity of the exhibits produced. The identity of the exhibits when ruled in favour of an accused person had earned him an acquittal as decided in *Sia Pang Liong v Public Prosecutor* [2013] 2 MLJ 490 and *Yusri Pialmi v Public Prosecutor* [2011] 4 MLJ 533 (see para 4).

[Bahasa Malaysia summary

Perayu-perayu dalam kedua-dua rayuan telah didakwa secara bersama dan disabitkan oleh Mahkamah Tinggi atas kesalahan pengedaran 5,029g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan dijatuhkan hukuman mati. PW2, agen provokator yang, berdasarkan maklumat yang diterima daripada pemberi maklumat, menghubungi perayu dalam Rayuan No A-05(M)-200–04 Tahun 2018, Muhamad Zafir bin Ramli ('Ipin') untuk pembelian dadah tersebut. Kedua-duanya bertemu di tempat pertemuan yang diatur di mana perjanjian telah ditetapkan dan pada tarikh, masa dan tempat yang ditetapkan, seperti dalam pertuduhan, mesyuarat kedua untuk penghantaran lima kilogram dadah itu diadakan. Selepas Ipin ditunjukkan wang oleh PW2, dia meminta PW2 untuk mengikutinya ke lorong di belakang kedai Tomyam. Di lokasi tersebut, perayu dalam Rayuan No A-05(M)-199–04 Tahun 2018, Mohamad Aliff bin Mohamed Alias ('Aliff') juga hadir. Ipin kemudian mengarahkan Aliff untuk menyerahkan beg kepadanya, yang kemudiannya dibuka untuk menunjukkan kandungannya, yang merupakan kepingan ganja, kepada PW2. Isyarat yang diatur sebelumnya oleh PW2 mendorong pasukan serbuan polis hadir di sekitar untuk menyerang kedua-dua pesalah.

Diputuskan, membenarkan rayuan; mengetepikan sabitan dan hukuman oleh Mahkamah Tinggi; dan melepaskan dan membebaskan perayu:

(1) Terdapat keraguan yang munasabah dituimbulkan bahawa lima kepingan ganja yang dikemukakan di mahkamah sebagai ekshibit bukanlah kepingan yang sama yang dirampas pada masa serbuan tersebut. Gambar-gambar kepingan ganja yang dirampas menunjukkan dalam jumlah sepuluh kepingan ganja — bukan lima. Kedua, keterangan PW5 adalah bahawa dia membuat kelaran kecil di sudut penutup aluminium setiap kepingan tetapi ahli kimia, PW3 sangat jelas berkata dalam pemeriksaan balas oleh peguam yang bijaksana untuk Ipin bahawa lima kepingan yang diterima telah dibungkus dengan baik. Ia sangat menjejaskan pendakwaan kerana ia bercanggah dengan PW5. Oleh itu, terdapat sebab yang nyata untuk meragui identiti ekshibit yang dikemukakan. Identiti ekshibit apabila diputuskan berpihak kepada seseorang tertuduh telah mewajarkan sebagai pembebasan yang diputuskan dalam *Sia Pang Liong v Public Prosecutor* [2013] 2 MLJ 490 dan *Yusri Pialmi v Public Prosecutor* [2011] 4 MLJ 533 (lihat perenggan 4).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)

Sia Pang Liong v PP [2013] 2 MLJ 490, FC (refd)

Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141; [2010] 4 CLJ 529, FC (refd)

Yusri bin Pialmi v PP [2011] 4 MLJ 533, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B(1)(a), 40A(1)

Evidence Act 1950 s 34

Appeal from: Criminal Trial No 45A-4–08 of 2016 (High Court, Ipoh)

Ariff Azami bin Hussein (Azizzul & Ariff) in Appeal No A-05(M)-199–04 of 2018 for the appellant.

Mohamad Hafiz bin Jalaludin (Mohd Fitri bin Asmuni and Mohamad Salihen bin Mastor with him) (Alif, Hafiz & Partners) in Appeal No A-05(M)-200–04 of 2018 for the appellant.

Mohamed Faizal bin Mohamed Fedder (Muhammad Azmi bin Mashud and Ku Hayati bt Ku Haron with him) (Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

INTRODUCTION

[1] The appellants in these two appeals were jointly charged and convicted by the High Court for the offence of trafficking in 5,029g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and sentenced to death for it. The charge is Bahasa Malaysia reads as follows:

> Bahawa kamu bersama-sama, pada 7 Januari 2016 jam lebih kurang 3.30 pagi, di belakang Kedai Makan Restoren Tom Yam Kelapa Muda, No 28, Hala Taman Meru 11, Taman meru 2B, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah mengedar dadah berbahaya iaitu sejumlah 5,029 gram Cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

GIST OF THE PROSECUTION'S CASE

[2] The prosecution's case against the appellants was built on the evidence of PW2, an agent provocateur who, based on information received from his informer, contacted the appellant in Appeal No A-05(M)-200–04 of 2018, Muhamad Zafir bin Ramli (hereinafter referred to by his nickname as adduced at the trial, that is, Ipin) for the purchase of the drug. The price offered by Ipin was RM2,300 per kilogram.

They both met at an arranged meeting place where the deal was set and on the appointed date, time and place, as in the charge, a second meeting for the delivery of five kilograms of the drug was held. After Ipin was shown the money by PW2 behind a burger shop, he asked PW2 to follow him to a lane behind a Tomyam shop. At that location the appellant in Appeal No A-05(M)-199–04 of 2018, Mohamad Aliff bin Mohamed Alias ('Aliff') was also present. Ipin then directed Aliff to hand over a bag (exh P5A) to him, which he then opened to show its content, which were the slabs of cannabis, to PW2. The pre-arranged signal by PW2 prompted the police raiding team present in the vicinity to swoop in on the two culprits.

GIST OF THE DEFENCE

[3] Ipin's testimony under oath was to deny that he was present at the scene. He said at that material time he was with a friend called Peh as well as Aliff in the latter's house. He then saw these two leaving the house and shortly thereafter, the police came to the house and arrested him as well as seized his handphone. The said handphone was found to be without any Sim card. When he was brought out of the house, he saw that Peh and Aliff had also been arrested by the police.

Aliff's defence, also given under oath, was that he chanced upon Ipin behind the tomyam shop and was told by Ipin that he wanted to sell a stolen laptop to someone who would be coming shortly. He requested Aliff to get a bag with the stolen laptop from Peh's house. He did as was told and after handing over the bag to Ipin who was with PW2 then, Aliff left and not long after that he was arrested.

It can be seen from the brief summary of both the defences that they were a denial of the commission of the offence. That of Ipin is even a notch higher — he was not even at the place of arrest and bordered on alibi. However that defence of his was impugned by that of Aliff who positively placed him at the scene of the crime and this fact was considered by the learned judicial commissioner when Her Ladyship concluded that defence of Ipin failed to raise any reasonable doubt on the prosecution's case. As for Aliff, she held that he was not an innocent carrier and was guilty of wilful blindness because he did not question Ipin about the content of the bag and there was no reason for the sale

of the laptop to be made so early in the morning. The learned judicial commissioner also noted that Aliff struggled when he was arrested and this shows knowledge.

Bearing in mind that this was a case of direct selling of the drug from the evidence of PW2 as the agent provocateur on the negotiation and the delivery of the same, it cannot be gainsaid that the defence of Ipin should not exculpate him from the charge. As was rightly raised by the learned judicial commissioner in her judgment, the Federal Court's decision in *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 4 CLJ 529 is that the evidence of an agent provocateur is one worthy of credit as provided under s 40A(1) of the DDA, even though presuming that he is so is rebuttable by evidence to the contrary. We have to say that upon our scrutiny of the evidence, none can be taken to impinge on PW2's credit worthiness and his evidence on the negotiation and the sale remains intact. As for Aliff, it is a fact that the investigating officer ('PW6') answered 'maybe' to the questions posed by learned counsel for Aliff that he had no knowledge of the content of the bag and thought it was a stolen laptop. This was how the questions were framed:

S: Saya cadangkan bahawa OKT2, tidak mempunyai pengetahuan tentang kandungan dalam beg tersebut

J: Mungkin.

S: Setuju, OKT2 menyangkakan bahawa dalam beg pink tersebut terdapat laptop curi

J: Mungkin.

Against that evidence is the evidence of PW2, though disputed by Aliff, that he was present and standing in between Ipin and PW2 when the bag and its content was shown. It was also not disputed that Aliff never brought up the issue about the stolen laptop during the investigation of the case by PW6, DSP Mohd Syukry, although he was cross-examined on this at the trial which evidence we had just referred to above. We also need to mention that Aliff's counsel also put it to Ipin that Aliff told Ipin he was selling a stolen laptop and that the buyer would come shortly (see p 129 lines 3844–3846 of appeal record Vol 2).

Based on the role played by Aliff and if one were to discount the evidence of PW6 as reproduced above there would indeed be no reason to say the learned judicial commissioner was wrong in dismissing his defence of an innocent carrier. However, that equivocal evidence of the PW6 which was never mentioned by the learned judicial commissioner in her judgment must, in fairness be construed in favour of Aliff for the benefit of the doubt expressed by no less than the officer tasked with the investigation of the case, must be given to him. Assuming we were wrong to say so, then from the role played by Aliff, one cannot deny that the circumstances were such that the ingredient of common intention under s 34 of the Evidence Act 1950 had been fulfilled by

Ipin negotiating the deal with PW2, and the said deal being set by the delivery of the drug by Aliff. As was held by the Federal Court in *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603:

> The existence of a *common intention* is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was *common intention* to commit the offence for which the accused can be convicted. The facts and circumstances of case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the *common intention* is an incident of fact and not of law.
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> For a charge premised on *common intention* to succeed it is essential for the prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

In other words there was from the respective roles played by the two, evidence of a pre-planned action which constituted the act of trafficking as defined in s 2 of the Act, to wit, 'selling'.

Nonetheless, we had after hearing arguments on the appeal decided to not just acquit Aliff but Ipin as well on this one issue which we are certain had rendered the convictions entered by the learned judicial commissioner unsafe.

IDENTITY OF THE DRUG EXHIBIT

[4] We reiterate that it is the prosecution's case that the five slabs of cannabis were found in the bag brought over by Aliff and handed over to Ipin which was shown to PW2. It was not disputed that five slabs of cannabis were produced in court as exhibits and marked as exhs P6(A)ii, P6(B)(ii), P6(C)(ii), P6(D)(ii) and P6E(ii) and they were the very same ones which were sent to the chemist (PW3) for analysis who confirmed that it was cannabis and of the weight as stated in the charge. PW6 also stated that the five slabs were marked and initialled by him after receipt from PW2, that they were in safe custody from then on until they were sent to, then returned by the chemist and until their production in court. However, what was disputed was whether these were the very same slabs seized at the time of the raid and we say that there was a reasonable doubt raised that this was not so for the following reasons.

First, photographs of the slabs of cannabis seized (exhs P9(C)–(L)) at pp 10–14 of appeal record Vol 3 shows in total ten slabs of cannabis — not five. Secondly, the evidence of PW5 was that he made a small nick ('torehan kecil') at the corner of aluminium cover of each slab but the chemist, PW3 very clearly said in the cross-examination by learned counsel for Ipin that the five slabs he received were nicely wrapped. The exact question put to him at p 42 or the appeal record Vol 1 were as follows:

S: Semasa memeriksa bungkusan SD1-SD5, bungkusan ini dibalut dengan pita pelekat dan kertas aluminium

J: Betul.

S: Adakah bungkusan-bungkusan dibalut dengan pita pelekat *dan kertas aluminium* dalam keadaan baik dan tiada kesan koyakan

J: Setuju.

S: Saya katakan pada pemeriksaan pada kelima-lima bungkusan dalam keadaan elok dan tidak dibuka oleh sesiapa melainkan encik

J: Setuju.

S: Bungkusan SD1-SD5 encik buka utuk tujuan analisa

J: Setuju.

S: Saya katakan bungkusan ini SD1-SD5 ada yang telah dibuka terlebih dahulu sebelum encik buka

J: Tidak setuju. (Emphasis added.)

His insistence that the packages were properly wrapped, particularly in respect of the aluminium foil was very damning to the prosecution because it contradicted that of PW5 as stated earlier.

Further, from the photographs of the exhibits (IDD26) as produced from the press conference held by PW5 on 7 January 2016, a day before the exhibits were sent to the chemist, there were not just a small nick on the aluminium foil cover of two of the slabs of cannabis but a big one (see p 39 of appeal record Vol 3). Now although IDD26 was not formerly marked as an exhibit, but PW6 had admitted the authenticity of the same and the failure to do so was therefore not fatal to the issue raised. Based on these evidence there was, in our view, a genuine reason to doubt the identity of the exhibits produced. For the record, PW6 had been challenged in cross-examination that the exhibits sent to the chemist were not the ones seized on that day. This challenge, as well as the evidence referred to above appears at p 105 Vol 2 of the appeal record and is reproduced below:

S: Saya katakan kelima-lima ketulan dadah yang dihantar ke JKM ini bukanlah dadah yang terlibat dalam tangkapan OKT1 & 2.

J: Tidak setuju.

S: Dalam kes ini ada dibuat sidang akhbar. **A**

J: Ada.

S: Bila

J: Rujuk ID siasatan dan keratan akhbar.

Peguambela: Tidak perlu pada masa ini kerana keratan tiada dalam eksibit. **B**

S: Rujuk Berita Harian Online.

TPR: Bantah kerana tidak tahu punca daripada mana dan bukan terlibat dalam siasatan dan tiada siapa boleh sahkan salinan ini.

En Khairil: Percaya saksi boleh sahkan kerana ada gambar saksi J: Sahkan ini gambar saya. **C**

Mahkamah: Teruskan.

S: Boleh baca kandungan repot muka surat 2-3.

J: Gambar dan kandungan betul. **D**

The exact same points on the identity of the exhibits when ruled in favour of an accused person and had earned him an acquittal have been decided by the Federal Court and we were appraised of two of them by Ipin's counsel. In *Sia Pang Liong v Public Prosecutor* [2013] 2 MLJ 490 this was what was crucially said by the court on this issue: **E**

> [10] In this case, it is not true that the identity of the drug exhibits was not disputed by the defence. PW7 was cross-examined on this issue. At p 84 of the record of appeal, PW7 was asked:
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> > Saya cadangkan barang-barang kes yang dirampas daripada OKT jika ada bukanlah barang-barang yang ada di Mahkamah hari ini. **F**
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> [11] Thus, the identity of the drug exhibits was being challenged by the appellant. *Once there is such a challenge, the prosecution bears the burden of proving beyond reasonable doubt that there are no gaps in the chain of evidence.* It is the burden of the prosecution to adduce evidence that the drug exhibits that were recovered from the appellant and that were sent to the chemist for analysis were the same drug exhibits that the appellant was charged with. (Emphasis added.) **G**

Earlier, in *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533 this was what the court similarly held: **H**

> [11] We would like to categorically state here that the evidence adduced by the prosecution in the present case showed there is a reasonable defect in the identity of the case exhibit which is the subject matter of the prosecution against the appellant. In a criminal trial an accused person is permitted to take every available opportunity to reveal any defect in the prosecution's case (see the case of *Yeong Kia Heng v Pendakwa Raya* [1992] 1 MLJ 327. *A defect with regard to the identity of the case exhibit in the present case to us is a serious matter. On this ground alone the appellant would succeed in his appeal.* (Emphasis added.) **I**

Hence, on the strength of the case authorities as cited above which we have no reason to distinguish, we have to discharge and acquit Ipin and Aliff for the safety of their convictions had been compromised. Their respective appeals were therefore allowed and the convictions and sentences passed by the learned judicial commissioner are set aside.

Appeal allowed; convictions and sentences by High Court set aside; and appellants discharged and acquitted.

Reported by Ahmad Ismail Illman Mohd Razali